Perwira Affin Bank Bhd v Lim Weow

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W–02–463 OF 1995
SITI NORMA YAAKOB, MAHADEV SHANKAR AND DENIS ONG JJCA
13 MAY 1998

Land Law *— Sale of land — Order for — Application to preclude chargee from carrying on with sale — Allegation that order made by the land administrator was a nullity and/or barred by limitation — Limitation Act 1953 ss 9 & 21*

The respondent is the registered and beneficial owner of two pieces of property ('the property'). She created a third legal charge over the property in favour of the appellant ('the bank') as security for a loan facility granted by the bank to the borrowers. The borrowers subsequently defaulted in their obligation to repay the loan and the bank as the chargee commenced foreclosure proceedings against the respondent with the issue of a Form 16E notice under the National Land Code 1965 ('the NLC') on 2 November 1979. When the amount demanded was not paid within one month stipulated in the notice, the bank applied for an order for sale from the Land Administrator, Kuala Lumpur ('the land administrator') who held an enquiry and made an order for sale on 2 June 1981 ('the first order'). The auction was called off due to irregularities in the enquiry. The land administrator then commenced a fresh enquiry and made a new order for sale ('the second order') and fixed a new auction date. The second auction was also called off.

Subsequently, the respondent received a notice of the land administrator informing her that a new enquiry date had been fixed. The respondent applied to preclude the bank from carrying on with the sale on the ground that the second order made by the land administrator was a nullity and that the bank's claim to proceed with the sale under the first order was barred by limitation. The trial judge found that after 2 June 1982, the land administrator was functus officio and therefore the second order was invalid; and the only valid order for sale was the first order but the bank could not enforce it as it was barred by limitation under s 9(1) of the Limitation Act 1953 ('the Act'). The bank appealed. At the appellate stage, counsel for the respondent also maintained that even if s 9(1) was not applicable, s 21(1) of the Act was applicable and thus limitation had set in.

Held, allowing the appeal:

(1) The trial judge had correctly found that the Land Administrator had become functus officio upon making his order on 2 June 1981 and he could only reopen the enquiry in the circumstances stated in s 34(2) of the NLC, which did not apply to this case (see p 61G).

(2) Section 9(1) of the Act speaks of limitation in actions for the recovery of land. This appeal was concerned with the enforcement of a charge to recover money due to the bank as chargee and not with the recovery of the lands charged. Therefore, s 9(1) was irrelevant to the facts of this appeal. The trial judge had erred when she decided that s 9(1) applied so as to render the first order unenforceable by reason of limitation (see p 62A–B).

(3) 'The right to receive the money accrued' in s 21(1) of the Act must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice, after which time starts to run. Since the notice was served on the respondent on the same date it was issued, ie 2 November 1979, the respondent had one month from that date to make payment. As the first order was made on 2 June 1981, the 12-year limitation period means that limitation had not set in as to render it unenforceable. As such, the land administrator could still fix a new date for auction as there was no bar as to when an auction could be conducted following an order for sale (see p 62D–G).

[Bahasa Malaysia summary

Penentang adalah tuan punya berdaftar dan benefisial dua hartanah ('hartanah tersebut'). Beliau telah mewujudkan gadaian sah ketiga ke atas hartanah tersebut atas nama perayu ('bank tersebut') sebagai jaminan bagi kemudahan pinjaman yang telah diberikan oleh bank tersebut kepada peminjam-peminjam. Peminjam-peminjam kemudiannya telah memungkiri kewajipan mereka untuk membayar pinjaman itu dan bank tersebut sebagai pemegang gadaian telah memulakan tindakan halang tebus terhadap penentang dengan mengeluarkan notis Borang 16E di bawah Kanun Tanah Negara 1965 ('KTN') pada 2 November 1979. Apabila jumlah yang dituntut tidak dibayar dalam tempoh sebulan yang ditetapkan dalam notis itu, bank tersebut telah memohon untuk mendapatkan perintah untuk jualan daripada Pentadbir Tanah, Kuala Lumpur ('pentadbir tanah tersebut') yang telah mengadakan satu siasatan dan membuat satu perintah untuk jualan pada 2 Jun 1981 ('perintah pertama'). Lelong tersebut telah dibatalkan disebabkan oleh luar aturan dalam siasatan tersebut. Pentadbir tanah tersebut kemudiannya telah memulakan siasatan yang baru dan membuat satu perintah baru untuk jualan ('perintah kedua') dan menetapkan satu tarikh lelong yang baru. Lelong yang kedua juga telah dibatalkan.

Kemudiannya, penentang telah menerima satu notis daripada pentadbir tanah tersebut yang memaklumkan bahawa satu tarikh siasatan yang baru telah ditetapkan. Penentang telah memohon untuk menghalang bank daripada menjalankan penjualan tersebut atas alasan bahawa perintah kedua yang dibuat oleh pentadbir tanah tersebut adalah suatu pembatalan dan bahawa tuntutan bank tersebut untuk

meneruskan penjualan tersebut di bawah perintah pertama terhalang oleh had masa. Hakim perbicaraan mendapati bahawa selepas 2 Jun 1982, pentadbir tanah tersebut adalah functus officio dan dengan itu perintah kedua adalah tak sah; dan satu-satunya perintah untuk jualan yang sah adalah perintah pertama tetapi bank tersebut tidak dapat menguatkuasakannya kerana ia terhalang oleh had masa di bawah s 9(1) Akta Had Masa 1953 ('Akta tersebut'). Bank tersebut telah merayu. Di peringkat rayuan, peguam penentang juga mempertahankan bahawa sekalipun s 9(1) tidak terpakai, s 21(1) Akta tersebut adalah terpakai dan dengan itu had masa telah pun berkuatkuasa.

Diputuskan, membenarkan rayuan:

(1) Hakim perbicaraan telah dengan betulnya mendapati bahawa pentadbir tanah tersebut telah menjadi functus officio setelah membuat perintahnya pada 2 Jun 1981 dan beliau hanya boleh membuka semula siasatan dalam keadaan-keadaan yang dinyatakan dalam s 34(2) KTN, yang mana tidak terpakai kepada kes ini (lihat ms 61G).

(2) Seksyen 9(1) Akta tersebut menyebut mengenai had masa dalam tindakan-tindakan untuk mendapatkan semula tanah. Rayuan ini berkaitan dengan penguatkuasaan satu gadaian untuk mendapatkan semula wang yang kena dibayar kepada bank sebagai pemegang gadaian dan bukannya berhubung dengan mendapatkan semula tanah yang telah digadaikan. Dengan itu, s 9(1) tidak relevan kepada fakta-fakta rayuan ini. Hakim perbicaraan telah terkhilaf apabila beliau memutuskan bahawa s 9(1) terpakai bagi menjadikan perintah pertama tidak boleh dikuatkuasakan akibat had masa (lihat ms 62A–B).

(3) 'Hak untuk menerima wang yang terakru' dalam s 21(1) Akta tersebut mestilah merujuk kepada masa ketika penentang memungkiri dalam kewajipannya untuk membuat pembayaran selepas disampaikan dengan notis Borang 16E, selepas yang mana masa akan mula diperhitungkan. Oleh kerana notis tersebut telah disampaikan ke atas penentang pada tarikh yang sama ia dikeluarkan, iaitu 2 November 1979, penentang mempunyai masa selama sebulan daripada tarikh itu untuk membuat pembayaran. Oleh kerana perintah pertama telah dibuat pada 2 Jun 1981, tempoh had masa selama 12 tahun bermakna bahawa tempoh had masa tersebut masih belum tiba bagi menjadikannya tidak boleh dikuatkuasakan. Oleh yang demikian, pentadbir tanah tersebut masih boleh menetapkan satu tarikh yang baru untuk lelong kerana tidak terdapat halangan mengenai bilakah sesuatu lelong boleh dijalankan berikutan dengan perintah untuk jualan (lihat ms 62D–G).]

Notes

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 1996 Reissue) paras 2605–2670 and 1471–1500.

Case referred to

Eu Finance Bhd v Lim Yoke Foo [1982] 2 MLJ 37; [1985] 1 MLJ 17 (refd)

Legislation referred to

Limitation Act 1953 ss 9(1), 21(1)
National Land Code 1965 ss 34(2), 255, 260(2), 263

Appeal from: Originating Motion No S4–21–124 of 1994 (High Court, Kuala Lumpur)

Khoo Guan Huat (*Leong Wai Hong* with him) (*Skrine & Co*) for the appellant.

Malik Imtiaz Sarwar (*Karina Yong* with him) (*Vazeer Akbar Majid & Co*) for the respondent.

Siti Norma Yaakob JCA (delivering judgment of the court): The hearing of this appeal was preceded by a notice of motion filed by the appellant ('the bank') to include a supplementary memorandum of appeal as part of the appeal records. The application became necessary as the judgment of the trial judge was only made available four days before the hearing of the appeal itself and upon perusal of it, the bank was advised that it was necessary to add further grounds of the appeal to their original memorandum drafted without the benefit of the judgment.

Encik Malik Imtiaz Sarwar, counsel for the respondent, objected to the application on the ground that the additional grounds should have been obvious from the terms of the order appealed against. But without the benefit of the judgment, the bank could not reasonably be expected to formulate all its grounds of appeal. In any event, in their original memorandum of appeal, the respondent had been put on notice of the bank's intention to adduce further grounds after the judgment was made available. So we allowed the application, but gave counsel for the respondent time to consider his arguments in reply.

The appeal itself is founded on the following facts.

The respondent is the registered and beneficial owner of two pieces of property held under GM Nos 156 and 161 for Lot Nos 16398 and 16403, Mukim of Batu, Wilayah Persekutuan ('the property'). She created a third party first legal charge over the property in favour of the bank as the security for a loan facility of RM300,000 granted by the bank to a company known as Tan Realty Development Sdn Bhd ('the borrowers'). The charges were created on 14 February 1977 and registered on 9 March 1977.

The borrowers defaulted in their obligation to repay the loan and on 2 November 1979, the bank as the chargee, commenced foreclosure proceedings against the respondent, the chargor, with the issue of a Form 16E notice under s 255 of the National Land Code 1965 ('the NLC'). When the amount demanded was not paid within one month stipulated in the notice, the bank applied for an order for sale from the Land Administrator, Kuala Lumpur who held an enquiry, and made an order for sale on 2 June 1981 ('the first order') and fixed 29 July 1981 as

the auction date. That auction was called off and in his letter dated 17 August 1981 addressed to the bank's solicitors, the land administrator indicated irregularities in the enquiry as the reasons for calling off the sale. He identified the irregularities to be:

(1) 'notis tidak dapat disampaikan dengan sempurna'; and

(2) there was no independent valuation of the forced value of the property.

It is not too clear from the records of appeal what notice the land administrator was referring to in his letter. Suffice it is to say that whatever irregularities that had occurred relate only to the holding of the auction and not with the order for sale. Both counsel argued the appeal on the premise that the first order for sale was a valid order.

In an effort to resolve the whole matter, the bank by their letter dated 4 September 1981 addressed to the borrowers, agreed to withhold the foreclosure proceedings on the undertaking that a sum of RM400,000 was to be transferred from the credit facilities granted to a company, Asialand Housing Development Sdn Bhd, to off set the borrowers' outstanding liability and further fulfillment of the following two conditions:

(1) That the borrowers pay RM39,179.47, this being the difference between the sum owed by them and the RM400,000 credited from Asialand's accounts.

(2) That the borrowers execute a further charge over the properties held under EMR 2683 and EMR 2264 to secure the excess on the overdraft facility.

The borrowers were not able to comply with condition (2) as the registration of further charges on the properties in question was blocked by several caveats lodged by other interested third parties.

As the loan was still outstanding, the bank continued with their foreclosure proceedings. The land administrator then commenced a fresh enquiry ('the second enquiry') on 24 November 1982, made an order for sale on 16 July 1984 ('the second order') and fixed 12 September 1984 as the auction date. At about the same time, the respondent filed Civil Suit F353/84 on 15 August 1984 against the bank, primarily seeking redemption of the property and for an injunction to restrain the bank from proceeding with the sale. The respondent's application for an interim injunction came to a premature end when the land administrator acting on the advice of the Attorney General called off the sale. That course of action was notified to the respondent by letter dated 22 August 1984, wherein non-compliance of s 263 of the NLC was given as the reason for not proceeding with the sale and that a fresh enquiry will have to be held.

Between March 1988 to March 1994, the respondent received three notices from the land administrator informing her of new dates of enquiry to be held to consider the bank's application under s 260(2) of the NLC but on each occasion, the enquiry was adjourned at the request of the respondent pending the outcome of her Civil Suit F353/84, and her appeal in the same proceedings following the dismissal of her suit on 8 September 1988. The result of this appeal has not been made known to us.

A The respondent received the last notice of the land administrator dated 14 July 1994 informing her that a new enquiry date had been fixed for 13 September 1994. In a desperate attempt to prevent the land administrator from proceeding, the respondent filed the application leading to this appeal in Originating Summons S4–21–124–94 on 24 August 1994 against the bank and the land administrator to preclude the bank from carrying on with the sale on the ground that the second order made by the land administrator was a nullity and that the bank's claim to proceed with the sale under the first order is barred by limitation.

The learned trial judge agreed with the respondent and found that:

(1) after 2 June 1982, the land administrator was functus officio and that the second order was invalid; and

(2) the only valid order for sale was the first order but the bank could not enforce it as it is barred by limitation under s 9(1) of the Limitation Act 1953 ('the Act').

Pursuant to these findings, he learned trial judge made the following orders:

(1) The bank is statute barred from continuing with the foreclosure proceeding against the respondent.

(2) The first order is unenforceable as it is statute barred.

(3) All orders made and enquiries held by the land administrator after 2 June 1981 are null and void.

(4) The Land Administrator is statute barred or estopped from holding any further enquiry or making any further order for sale on the property.

(5) Costs to the respondent.

Argument before us proceeded on the premise that the only valid order for sale is the first order as that is a final order. In this respect, we consider that the learned trial judge correctly found that the land administrator had become functus officio upon making his order on 2 June 1981 and he could only reopen the enquiry in the circumstances stated in s 34(2) of the NLC. (See the Federal Court decision in *Eu Finance Bhd v Lim Yoke Foo* [1982] 2 MLJ 37, which was affirmed by the Privy Council and reported at [1985] 1 MLJ 17.)

Since both parties have accepted that s 34(2) of the NLC does not apply to this case, we were left to consider whether the learned trial judge was correct when she ruled that by s 9(1) of the Act, the first order could no longer be enforced by reason of limitation.

Section 9(1) reads as follows:

> No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person.

Section 9(1) speaks of limitation in actions for the recovery of land. This appeal is concerned with the enforcement of a charge to recover money due to the bank as chargee. That enforcement takes the form of a sale of the charged property under the provisions of the NLC and under the supervision of the land administrator. As such, the appeal has nothing to do with the recovery of the lands charged and to that extent, s 9(1) is irrelevant to to the facts of the appeal. The learned trial judge erred when she decided that s 9(1) applies so as to render the first order unenforceable by reason of limitation.

Counsel for the respondent nonetheless maintained that a parallel can be drawn from s 21(1) of the same Act and submitted that limitation had set in. The relevant provisions of sub-s (1) of s 21 read as follows:

> No action shall be brought to recover any principal sum of money secured by a ... charge on land ... or to enforce such ... charge, ... after the expiration of twelve years from the date when the right to receive the money accrued.

'The right to receive the money accrued' in s 21(1) must refer to the time when the respondent defaulted in her obligation to make payment after being served with the Form 16E notice. Time then starts to run. Since the notice was served on the respondent on the same date it was issued, ie 2 November 1979, the respondent had one month from that date within which to make payment. That brings us to 2 December 1979 and counting 12 years from that date takes us to 1 December 1991. It is not clear from the appeal records when the foreclosure proceedings were instituted in court but even taking the first order that was made on 2 June 1981, it is clear that limitation has not set in as to render the first order unenforceable.

As the first order is still enforceable, the only matter left to be completed is the auction of the property. In this instance, the respondent cannot complain of the long delay in affecting the sale as by her own actions in filing Civil Suit F353/84 and the originating summons leading to this appeal, not to mention her many requests to postpone the sale, she had prevented the land administrator from fixing a new date for auction after the first two dates of auction in 1981 and 1984 were vacated. On the facts of this case, the land administrator can still do so as there is no bar as to when an auction can be conducted following an order for sale although prudence dictates that such an auction should follow immediately so as to lessen the respondent's burden of satisfying not only the principal sum due but also the accrued interest.

For the above reasons we had allowed this appeal with costs here and below. We also allowed the deposit to be refunded to the appellant.

Appeal allowed.

Reported by David Lai